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tions would seem to be those committed to other than judicial organs of government, not in terms excluding judicial control, but with respect to issues so distinctly political in character that a court should regard it as improper to seek to exercise control.²⁷ Essentially it seems that the action of a state legislature in passing upon a proposed constitutional amendment is governed by considerations of public policy and expediency, and may be political *per se*. At any rate, the refusal of the United States Supreme Court to look behind the certification in *Leser v. Garnett*,²⁸ and the fact that Congress has heretofore taken upon itself the task of determining such questions,²⁹ lend weight to a position that the Kentucky Court decided a political question in the principal case.

It is submitted that the Kentucky case³⁰ cannot be supported (1) because historical precedent, reason, and authority show that a rejection of a proposed amendment cannot preclude a subsequent valid ratification, (2) *a fortiori* rejection by more than one-fourth of the states cannot operate to withdraw the amendment from the states, (3) the proposed amendment was still before the states, no reasonable time having passed since its proposal, (4) the decision was gratuitous, certification of the ratification being *fait accompli* and merely evidentiary, and the Secretary of State of the United States not being subject to mandamus, and (5) the question is one primarily political, and therefore not properly subject to judicial determination.

STEVE WHITE.

HOMESTEADS—INVOLUNTARY CONFINEMENT IN ASYLUM OR PENITENTIARY AS CONSTITUTING AN ABANDONMENT.

In a recent Kentucky case,¹ the Court of Appeals handed down a decision to the effect that a homestead acquired under the homestead laws was not abandoned by enforced confinement in the penitentiary.

stein, Further Notes on Judicial Self-Limitation (1925), 39 Harv. L. Rev. 221; Weston, Political Questions, 38 Harv. L. Rev. 296.

²⁸ 3 Willoughby, Constitutional Law of the United States (1929), 1326; see also Dodd, *supra*, n. 24; Weston, *supra*, n. 24.

²⁷ Dodd, Non-Enforceable Provisions of Constitutions (1931), 80 U. Pa. L. Rev. 54, 85.

²⁸ 258 U. S. 130 (1922).

²⁹ *Supra*, n. 9.

³⁰ *Wise, et al. v. Chandler, et al.*, 270 Ky. 1, 108 S. W. (2d) 1024 (1937).

¹ *Cloinger v. Callahan*, 204 Ky. 33, 263 S. W. 700 (1924)—Defendant and his son were convicted of killing A, and sent to the penitentiary. A's widow and children sued defendant under Sec. 4, Ky. Stat., and garnished B bank in which defendant had some money. A alleged that the money was the proceeds from the sale of his homestead. Held, defendant had the right to sell his homestead and reinvest the proceeds in another homestead, and his homestead rights were not abandoned by his enforced confinement in prison.

Kentucky Statutes, Section 1702, allows a debtor a one thousand dollar (\$1,000.00) homestead exemption. The manner in which homesteads are lost or waived is varied. Whether involuntary confinement in an asylum or penitentiary constitutes or effects an abandonment is our problem here. The case of *Ciolinger v. Callahan*² is one of the few decisions in Kentucky in which the problem is raised.

Whether or not there has been an abandonment of a homestead will depend on whether or not there has been a manifestation of an intention to abandon it.³ What is and what is not an abandonment depends, therefore, largely on the facts of each particular case.⁴ In *Smith v. Moss*,⁵ the court said: "Temporary absence from the property claimed as a homestead will not operate as an abandonment of the right, if the claimant entertains an ever-present intention and purpose of returning to the property as a permanent home."⁶ Other Kentucky decisions are in accord.⁷

Specific legislation has been provided in many states as to abandonment of homesteads,⁸ though there is none present in Kentucky.

In order to constitute an abandonment of the homestead, the removal must be voluntary and not under compulsion. An abandonment is not occasioned by a removal or temporary absence caused by some casualty or necessity, if there is an intention of returning as

² 204 Ky. 33, 263 S. W. 700 (1924).

³ *Smith v. Moss*, 211 Ky. 226, 277 S. W. 245 (1925).

⁴ *Mattingly v. Berry*, 94 Ky. 544, 15 K. L. R. 288, 23 S. W. 215 (1893); *Campbell v. Potter*, 16 K. L. R. 535, 29 S. W. 139 (1895); *Central Asylum v. Craven*, 17 K. L. R. 667, 98 Ky. 105, 32 S. W. 291 (1895); *Carroll v. Dawson*, 20 K. L. R. 349, 103 Ky. 736, 46 S. W. 222 (1898); *Cin. L. T. W. Co. v. Thompson*, 20 K. L. R. 1439, 105 Ky. 627, 49 S. W. 446 (1899); *White v. Roberts*, 23 K. L. R. 2187, 112 Ky. 788, 66 S. W. 758 (1902); *Herring v. Johnston*, 24 K. L. R. 1940, 72 S. W. 793 (1903); *Riddle v. Fannin*, 24 K. L. R. 1737, 72 S. W. 290 (1903); *American Nat. Bank v. Mathews*, 124 S. W. 811 (Ky., 1910); *Purdy v. Melton*, 164 Ky. 749, 176 S. W. 346 (1915); *Louisville Tobacco Co. v. Calvert*, 180 Ky. 718, 203 S. W. 567 (1918); *Conway v. Reed*, 193 Ky. 287, 235 S. W. 747 (1921); *Smith v. Moss*, 211 Ky. 226, 277 S. W. 245 (1925); *Elliott v. Argenbright*, 221 Ky. 763, 299 S. W. 957 (1927); *Tylers' Exrs. v. Williamson*, 237 Ky. 579, 36 S. W. (2d) 34 (1931); *Williams v. Evans' Admrs.*, 247 Ky. 105, 56 S. W. (2d) 710 (1933); *Richardson v. Richardson*, 252 Ky. 235, 67 S. W. (2d) 7 (1934); *Brewer v. Brewer*, 268 Ky. 625, 105 S. W. (2d) 582 (1937).

⁵ 211 Ky. 226, 277 S. W. 245 (1925).

⁶ 211 Ky. 226 at 231, 277 S. W. 245 at 247.

⁷ *Taree v. Spriggs*, 149 Ky. 20, 147 S. W. 754 (1912); *Frazer v. Potter*, 150 Ky. 127, 150 S. W. 19 (1912); *Farmers' and Traders' Bank v. Childers*, 150 Ky. 719, 150 S. W. 840 (1912); *Baker v. Estridge*, 154 Ky. 659, 157 S. W. 1080 (1913); *Conway v. Reed*, 193 Ky. 287, 235 S. W. 747 (1921); *Ciolinger v. Callahan*, 204 Ky. 33, 263 S. W. 700 (1924).

⁸ *Ala. Code* (Mayfield, 1923), Sec. 7914; *Ariz. Rev. Code* (Struckmeyer, 1928), Sec. 1734; *Calif. Civ. Code* (Deering), Sec. 1243, 44; *Idaho Ann. Code* (Official Edition, 1932); Sec. 54-1007; *La. Gen. Stat.* (Dart, 1932), Sec. 3809; *Minn. Gen. Stat.* (Harvey, 1923), Sec. 8341; *Mo. Rev. Stat.* (1929), Sec. 337; *Mont. Rev. Code* (Choate), Sec. 6951; *Okla. Stat.* (Eagin and Eaton, 1931), Sec. 9663; *Tex. Stat.* (Vernon, 1936), Sec. 4618; *Utah Rev. Stat.* (1933), Sec. 38-0-7; *Wash. Code* (Pierce, 1929), Sec. 7866, 67.

soon as circumstances will permit. A casualty or necessity may consist of an imprisonment or confinement in either penitentiary or asylum.* Certainly, in an involuntary or compulsory absence there is no intent at the time of the absence to relinquish any rights, and moreover, there is a present and continuing intent to return. Residence away from the land is ordinarily not permissible for long periods of time, but under the special circumstances of involuntary confinement the residence away from the land is not such as would effect an abandonment. A person imprisoned under operation of law does not thereby change his residence.¹⁹ In an early Supreme Court case,²¹ the court said:

"It is only under special circumstances that residence away from the land is permissible. The settler may be excused for temporary absences caused by well founded apprehensions of violence, by sickness, by presence of an epidemic, *by judicial compulsion*, or by engagement in the military or naval service. Except in such cases, the requirement of a continuous residence on the part of the settler is imperative."²²

Let us consider separately the cases of other jurisdictions where claimants of homesteads were either confined to a prison, or placed in an asylum because of insanity.

In the few cases in which involuntary confinement in the penitentiary was considered, the cases are strongly in accord that the imprisonment did not constitute an abandonment of the property rights acquired under the *Homestead Laws*.²³ In *Millett v. Pearson*,²⁴ A was the owner and occupied the premises in question with his wife, as their homestead. On March 16, 1916, he shot and killed his wife, and was arrested and lodged in jail until June, when he was convicted and sentenced to the state prison for life. Held, that the premises continued to be his homestead. The court said:

"As a general rule of law persons under legal disability or restraint, or persons in want of freedom, are incapable of losing or gaining a residence by acts performed by them under the control of others. There must be an exercise of volition by persons free from restraint and capable of acting for themselves, in order to acquire or lose a residence. A person imprisoned under operation of law does not thereby change his residence."²⁵

* 29 C. J., p. 937.

¹⁹ *Millett v. Pearson*, 143 Minn. 187, 173 N. W. 411 (1919).

²¹ *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. Rep. 782 (1885).

²² 114 U. S. 47 at 51.

²³ *Withers v. Love*, 72 Kan. 140, 3 L. R. A. (n. s.) 514, 83 Pac. 204 (1905); *Clolinger v. Callahan*, 204 Ky. 33, 263 S. W. 700 (1924); *Anderson v. Anderson*, 5 Land. Dec. Dept. Int. 6; *Garner v. Freeman*, 118 La. 184, 118 Am. St. Rep. 361, 42 So. 767 (1907); *Lindsey v. Holly*, 105 Miss. 740, 63 So. 222 (1913); *Millett v. Pearson*, 143 Minn. 187, 173 N. W. 411 (1919); *Huffman v. Smyth*, 47 Ore. 573, 114 Am. St. Rep. 938, 84 Pac. 80 (1906); *Bryant v. Freeman*, 134 Tenn. 169, 183 S. W. 731 (1915).

²⁴ 143 Minn. 187, 173 N. W. 411 (1919).

²⁵ 173 N. W. (Minn.) 411 at 412.

In *Anderson v. Anderson*,¹⁶ claimant had settled on the tract in controversy some ten (10) or twelve (12) years prior to the contest, and had continuously resided there when he was arrested, and subsequently convicted and committed to the penitentiary for life. His claim was then contested on the ground of abandonment, but the contest was dismissed. Secretary Lamar, who rendered the opinion, said: "Anderson's absence from the land was by judicial compulsion, which would certainly be a valid excuse for temporary absence."

In *Garner v. Freeman*,¹⁷ plaintiff sought to enjoin the seizure and sale of certain personal property as exempt under the state Homestead Laws. Defendant's answer averred plaintiff's confinement in prison, and argued that since plaintiff was not in actual possession of the property at the time of the seizure, he could not claim the benefit of the Homestead Law. The court said: "Plaintiff did not voluntarily abandon his possession, and his incarceration did not deprive him of any of his property rights."¹⁸

In *Lindsey v. Holly*,¹⁹ appellant owned a tract of land at the time he married, which he occupied as a homestead. He was subsequently confined in a jail. Upon his release, he sued in ejectment for possession of the premises. Held, that he had lost no rights in the property by his confinement in the jail. The court based its decision on the fact that since the removal of the appellant was by necessity there could not be an abandonment, insofar as an abandonment implied a voluntary act of leaving the homestead property.²⁰

In *Huffman v. Smyth*,²¹ plaintiff had homestead rights in the lands in question. He was sent to prison for ten years, and then pardoned. In the meantime, his wife had divorced him and remarried. He sued for possession of the premises. Held, that his imprisonment did not effect an abandonment. The court said:

"If a settler has established an actual residence and made improvements on the land, then his removal therefrom and enforced absence by reason of conviction for a crime will not work an abandonment. The reason for this rule is doubtless twofold: First, that residence and abandonment are each determined in part by *intention*, and it cannot be said that the established residence carries with it the intention to abandon that from which he has been *unwillingly* removed. Secondly, that *abandonment is something more than the relinquishment of possession. It must be the voluntary relinquishment of possession united with an intention to abandon.*"²²

In *Withers v. Love*,²³ plaintiff acquired a homestead and lived there with his wife and children. The wife became insane and was

¹⁶ 5 Land Dec. Dept. Int. 6.

¹⁷ 118 La. 184, 42 So. 767 (1907).

¹⁸ 42 So. (La.) 767 at 769.

¹⁹ 105 Miss. 740, 63 So. 222 (1913).

²⁰ 63 So. (Miss.) 222 at 223.

²¹ 47 Ore. 573, 84 Pac. 80 (1906).

²² 84 Pac. (Ore.) 80 at 82.

²³ 72 Kan. 140, 83 Pac. 204 (1905).

committed to an asylum. Subsequently, plaintiff was imprisoned for a convicted crime. On his release, he claimed his homestead, and the court upheld his claim. The court mentioned that since plaintiff's civil rights were suspended during his sentence and confinement, the involuntary absence should not be given the effect of an abandonment.²⁴ It is interesting to note that in this case both insanity and imprisonment in a penitentiary are present. The wife was insane and the husband a convicted criminal.

In the cases of confinement to an asylum because of insanity, the courts are again strongly in accord that there is no abandonment, because the absence is involuntary, and the person confined is incapable of any intention in the matter.²⁵ In the case of *Lewis v. Lewis*,²⁶ a husband deserted his wife, who, becoming insane, was committed to an asylum. Held, that her absence because of the commitment was not an abandonment thereof so that his deed of the homestead, not signed and separately acknowledged by her, passed no title, and she was, therefore, entitled to possession. The court said:

"But she (the insane wife) did not leave it voluntarily; she was adjudged insane, and removed by force, tho in accordance with law; hence, this case presents the question: Does such a leaving constitute an abandonment by the wife? We hold that it does not. Actual occupancy in such cases is not required to preserve the homestead rights of the wife whose husband has abandoned her and absconded, leaving her without aid or assistance from him in her sad and unfortunate condition. It would be unconscionable to hold that he could, by such inhuman conduct, deprive her of the only source of support which he had left her. . . . Hence, involuntary or compulsory abandonment of or absence from the homestead will not be an abandonment or a forfeiture or waiver of the homestead rights."²⁷

In several earlier Kentucky cases, the same result was reached by the Court of Appeals. In *National Loan Association v. Maloney*,²⁸ R died the owner of a house and lot, leaving a widow and infant children occupying the premises. A creditor obtained a judgment of sale of the property subject to the widow's right to homestead. L, one of the heirs, purchased it and executed a five hundred dollar (\$500.00) mortgage upon it to appellant. The widow was an incurable lunatic confined to an asylum, and all of the children were over twenty-one

²⁴ 83 Pac. (Kan.) 204 at 207.

²⁵ *Lewis v. Lewis*, 201 Ala. 112, 77 So. 406 (1917); *Way v. Scott*, 118 Iowa 197, 91 N. W. 1034 (1902); *Natl. Loan Assn. v. Maloney*, 22 K. L. R. 1094, 60 S. W. 12 (1900); *Holburn v. Pfannmiller*, 24 K. L. R. 1613, 114 Ky. 831, 71 S. W. 940 (1903); *Eastern Insane Asylum v. Cottle*, 143 Ky. 719, 137 S. W. 235 (1911); *Alton Mercantile Co. v. Spindel*, 42 Okla. 210, 140 Pac. 1168 (1914); *Flynn v. Hancock*, 35 Tex. Civ. App. 395, 80 S. W. 245 (1904); *Speer v. Sykes*, 102 Tex. 451, 132 Am. St. Rep. 896, 119 S. W. 86 (1909); *Curry v. Wilson*, 45 Wash. 19, 87 Pac. 1065 (1906).

²⁶ 201 Ala. 112, 77 So. 406 (1917).

²⁷ 77 So. (Ala.) 406 at 408.

²⁸ 22 K. L. R. 1094, 60 S. W. 12 (1900).

(21) years of age, and not residing upon the property. It was contended that the widow had abandoned her homestead right. Held, that an abandonment under the circumstances did not amount to an abandonment of her right.

In *Holburn v. Pfanmiller*,²⁹ P died intestate, an inmate of the state insane asylum, where he had been admitted as a pauper patient. He owned a small piece of property in Louisville, worth seven or eight hundred dollars (\$700 or \$800). After P's death, the asylum had X appointed as administrator, and brought this action against P's heirs to subject the land to payment of the asylum fees. Held, that the property was not subject to the claim, as it was the homestead of P until his death, although he had been removed from it on account of his lunacy.

In *Eastern Insane Asylum v. Cottle*,³⁰ the state tried to subject the lunatic's land to the satisfaction of its claim for debtor's maintenance in the asylum. The debtor had homestead property when committed to the asylum. His wife had died and the children married, leaving the homestead. The debtor was an incurable lunatic and would never occupy the homestead again, yet, the court held that this was not a termination of the homestead exemption.

The homestead statute should be liberally construed and enforced in favor of the claimant, and with this view the Kentucky courts are in full accord.³¹ There is even more reason to favor the claimant in the cases of involuntary confinement to a penitentiary or an insane asylum. The rules for these decisions are based on sound reason. To constitute an abandonment, there must be a voluntary absence from the homestead, coupled with an intent to abandon.³² In the case of involuntary confinement in a penitentiary, both elements are lacking. There is a compulsory departure forced by the law, with no intent on the part of the convicted person to abandon the homestead. In the case of insanity, we have the same involuntary compulsion added to the fact that the person who is insane is incapable of any intention in the matter.³³ It is submitted, therefore, that since the elements of voluntary absence and intent to abandon are both lacking, confinement in a penitentiary or insane asylum does not effect abandonment of a homestead.³⁴

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²⁹ 114 Ky. 831, 71 S. W. 940 (1903).

³⁰ 143 Ky. 719, 137 S. W. 235 (1911).

³¹ *Williams v. Evans' Admr.*, 247 Ky. 105, 56 S. W. (2d) 710 (1933); *Richardson v. Richardson*, 252 Ky. 235, 67 S. W. (2d) 7 (1934); *Brewer v. Brewer*, 263 Ky. 625, 105 S. W. (2d) 582 (1937).

³² *Supra*, n. 13.

³³ *Supra*, n. 25.

³⁴ All italics in extracts from cases are writer's.